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Nos. 81-2245, 81-2276 & 82-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

TRUCKEE CARSON IRRIGATION DISTRICT,
Petitioner,
v.
UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,
v.
TRUCKEE-CARSON IRRIGATION DISTRICT, *et al.*,
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE STATES OF ARIZONA, CALIFORNIA, MONTANA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TEXAS, UTAH AND WYOMING IN SUPPORT OF PETITIONER STATE OF NEVADA

[List of endorsements on inside cover]

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QUESTION PRESENTED

Although the decision below dealt with other issues, this brief is limited to the following question:

> Whether in a comprehensive general water rights adjudication, claims must appear "adverse" on the face of the pleadings before the doctrine of res judicata/collateral estoppel can be asserted as a bar to relitigation of the same claims in a subsequent action.

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INTEREST OF AMICI

The western states named herein as *amici curiae* have elaborate systems for determining and administering water rights based upon the doctrine of prior appropriation. All of the named states have actively participated in integrating and finalizing the water rights of their citizens in relation to Federal Water rights, including those for Indian Reservations, located within their boundaries.

In promoting the settling and reclaiming of the arid lands of the western United States, the federal government relied heavily on state-created judicial and administrative procedures. This was especially true with regard to western water law. Recent decisions by this Court have reaffirmed the policy that development of water resources of the West by the federal government must be carried out in conformity with state water laws. *California* v. *United States*, 438 U.S. 645 (1978); *United States* v. *New Mexico*, 438 U.S. 696 (1978).

An essential element of virtually every western state system of water right determination is the comprehensive "general adjudication" of water rights. Such a proceeding provides a method whereby, at the request of water users or state officials, a determination of the respective interrelated water rights of all water right holders on a particular water source may be obtained. The only way to assure the effectiveness of such proceedings is to join all potential claimants in a single action, require that each claimant assert all potential claims and require that all parties be bound by the result.

As the Ninth Circuit concluded, there can be no doubt that the action which resulted in the *Orr Ditch* decree was a general adjudication proceeding. It was commenced to determine the relative rights of all parties in and to the waters of the Truckee River and its tributaries. The result required that all of the parties and

"all persons claiming by, through or under them" be enjoined from ever claiming any of the waters of the Truckee River in a manner contrary to the decree. As part of the proceeding the United States, acting as trustee, submitted claims for water rights on behalf of the Pyramid Lake Paiute Indian Tribe. Adjudicated rights for the Tribe were included in the decree. See Nevada Appendix filed with Petition for Writ of Certiorari (hereinafter Nevada Appendix) pp. 56a-58a. The United States also sought water rights for the Newlands Reclamation Project, the interests which subsequently became represented by TCID. The Project rights were also adjudicated. Nevada Appendix pp. 58-59a.

Despite the all inclusive nature of the action which led to the *Orr Ditch* decree, the Ninth Circuit has determined that the United States and the Paiute Indian Tribe are not precluded by the decree from disturbing the property rights adjudicated therein and asserting additional water rights on behalf of the Tribe. The decision thereby negates the purpose of the decree and jeopardizes the finalized rights of thousands of water right holders in the Truckee-Carson Irrigation District (hereafter *TCID*) who have relied for approximately forty years on the finality of the decree. More importantly, the decision has cast a cloud of uncertainty upon numerous other determinations of property rights wherein Indian claims were involved, especially other general adjudications in which the United States has asserted claims on behalf of Indian tribes. Thus, the decision runs contrary to the interests of sound public policy in assuring certainty and finality with regard to adjudicated private property rights and federal reserved rights. As a result, the *amici* feel compelled to urge this Court to reverse the decision of the Ninth Circuit insofar as it disrupts property rights which have been settled by court decree in a comprehensive general adjudication.

SUMMARY OF ARGUMENT

The circumstances of the litigation resulting in the *Orr Ditch* decree make clear that the requirements for the application of res judicata are satisfied. Therefore, the Pyramid Lake Paiute Indian Tribe and the United States must now be barred from asserting a reserved water right claim for fishery purposes at Pyramid Lake.

The *Orr Ditch* action can only be fairly described as a general adjudication settling all relative rights of the parties to the action and their privies. Res judicata should apply to the cause of action adjudicated regardless of the posture of the pleadings used to commence the action. The requirement of strict adversity on the pleadings is especially inapplicable in the context of a general water rights adjudication because all conflicting claims are adverse.

The United States had full authority to represent the Tribe in all matters connected with the litigation which resulted in the *Orr Ditch* decree. The stance of the government attorneys in the litigation was directed by policy decisions within the federal government. No collusive or fraudulent conduct occurred which should now prevent the application of res judicata.

The general adjudication process has become a cornerstone of the efforts of the western states to properly manage their water resources. The Ninth Circuit's decision threatens this process, with the result that numerous decrees could be called into question because of the government's multi-facetted representation of its interests in the West.

The federal government has made substantial investments for the benefit of the Pyramid Paiute Tribe to restore the Pyramid Lake fishery. Also, the Tribe has received direct payment for damages suffered as a result of not having received all of the water to which it was

entitled from Pyramid Lake. Under such circumstances, the Tribe should not now be allowed to shift responsibility for further alleged damages to other users of the Truckee River.

ARGUMENT

I. THE PRINCIPLES OF RES JUDICATA BAR THE ASSERTION OF A CLAIM TO A RESERVED RIGHT FOR FISHERY PURPOSES IN *PYRAMID LAKE*.

A. *The Elements of Res Judicata are Clearly Established in this Case.*

This Court has recently summarized the principles of res judicata and collateral estoppel in the following manner:

> "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. (Citations omitted.) Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. (Citations omitted.) Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions."

Montana v. *United States*, 440 U.S. 147, 153 (1979). The *Montana* decision reconfirmed this Court's departure from technical and rigid limitations on the application of the res judicata/collateral estoppel bar.

In the past only actual parties or those in formal privity with actual parties to a prior action could be bound by a prior judgment. Also, a rule of mutuality of estoppel was imposed, meaning that one party to a judgment could be bound in a subsequent suit only if the other party would have been bound similarly by a different

result. Strict mutuality required identity of the parties or privity between the parties in the two suits. The purpose of the mutuality rule was to assure each litigant his day in court. However, experience showed that exceptions to the overly strict privity and mutuality of estoppel rules were warranted. Thus, in *Bernhard* v. *Bank of America National Trust & Savings Association*, 122 P.2d 892 (1942), the California Supreme Court allowed a non-party to assert res judicata, requiring only that the party against whom the bar was asserted was a party or in privity with the party to the first suit.

This defensive use of res judicata became generally accepted, with its widespread use recognized and approved by this Court. *Blonder-Tongue Laboratories* v. *University of Illinois Foundation, et al.*, 402 U.S. 313 (1971). In *Sea-Land Services Inc.* v. *Gaudet*, 414 U.S. 573 (1974), this Court applied the collateral estoppel bar to non-parties who had been represented by a fiduciary in the prior action. In *Parklane Hosiery Co., Inc., et al.* v. *Shore*, 439 U.S. 322 (1979) this Court held that even the "offensive" use of collateral estoppel was permissible.

This broadening of the res judicata/collateral estoppel doctrines has developed to carry out the salutary purpose, as expressed by this Court in *Montana*, supra:

> "(of) . . . preclud(ing) parties from contesting matters that they have had a full and fair opportunity to litigate . . . (and) protect(ing) their adversaries from the expense and vexation attending multiple lawsuits, conserv(ing) judicial resources, and foster(ing) reliance on the judicial action by minimizing the possibility of inconsistent decisions. 440 U.S. at 153-154 (footnote deleted)

The Ninth Circuit refused to apply the res judicata/collateral estoppel principles as to TCID, opting instead in favor of a mechanical requirement of "adversity under the pleadings". This requirement is not only at odds with

the recent decisions of this Court, but also conflicts with other circuit court decisions holding that parties who were not formally adverse on the pleadings could be barred in later litigation between themselves.

In *Scooper Dooper, Inc.* v. *Kraftco Corp.*, 494 F.2d 840 (3d Cir. 1974), the Third Circuit Court of Appeals rejected formal adversity on the pleadings as a requirement for the application of collateral estoppel, stating:

> ". . . (T)his Circuit's nullification of the mutuality requirement renders non-adversity irrelevant to the doctrine of collateral estoppel. In this Circuit, a total stranger to prior litigation may, in a subsequent suit, estop a party from re-litigating a claim which he lost in the prior controversy, provided that the initial opportunity to present the claim was full and fair."

Id. at 845 (footnote deleted). This reasoning has also been followed in *Oldham v. Pritchett*, 599 F.2d 274, 278 (8th Cir., 1979) wherein the Court abandoned the requirement of "strict adversity" on the pleadings, which it recognized as outdated, being the "companion rule to 'mutuality'." *See also Diamond Shamrock Corp.* v. *Lumbermans Mutual Casualty Co.*, 416 F.2d 707 (7th Cir. 1969); *Livesay Industries, Inc., et al.* v. *Livesay Window Co. Inc.*, 202 F.2d 378 (5th Cir., 1953); *National Bondholders Corp.* v. *Seaboard Citizens National Bank of Norfolk, Virginia*, 110 F.2d 138 (4th Cir., 1940).

The circumstances surrounding the litigation which resulted in the *Orr Ditch* decree clearly demonstrate that the decree represents a decision to which the principles of res judicata should apply. The amended complaint filed by the United States in *Orr Ditch* was designed to be a comprehensive determination of the relative property rights of all interested parties. It read, in part:

> ". . . Second. That the court by its decree determine the relative rights of the parties hereto in and to the waters of the said river and its tributaries in

> Nevada, both natural flow and flood waters, to the end that it may be known how much of said waters may be diverted from said river by the parties hereto and for what purposes, where, by what means of diversion and with what priorities. Nevada Appendix p. 10a.

The purpose and nature of the *Orr Ditch* cause of action was provided in paragraph 18 of the amended complaint, which states:

> "Until the several rights of the various claimants, parties hereto, including the United States, to the use of the waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, and order in time of each right to divert said waters from said river and its tributaries has been judicially determined the United States cannot properly protect its rights in and to said waters, and to protect said rights otherwise than is herein sought if they could be so protected would necessitate a multiplicity of suits." *Id.*

Subsequent negotiations between the major parties to the *Orr Ditch* suit, including the United States, led to the Truckee River Agreement which served as the basis for the entry of the *Orr Ditch* final decree. See TCID Appendix filed with Petition for Writ of Certiorari (hereafter TCID Appendix) pp. A-110-A-184. As trustee for the Tribe, the United States was decreed a reserved water right of approximately 30,000 acre feet of water for the purpose of irrigation on reservation lands. Nevada Appendix pp. 56a-58a. The final decree provided, in relevant part, that all of the parties and "all persons claiming by, through or under them . . . [are] forever enjoined from ever claiming any rights in or to the waters of the Truckee River . . ." except as set forth in the decree. Nevada Appendix p. 145a.

Despite the unambiguous language of the final decree, the United States and the Tribe are now seeking to avoid the application of res judicata by arguing that

the Tribe was not a party to the litigation, that a reserved right for fishery purposes constitutes a cause of action separate from a reserved right for irrigation purposes and that res judicata cannot apply because many of the defendants in the present litigation are not the same defendants as those who participated in the *Orr Ditch* litigation.

The Ninth Circuit correctly held that the *Orr Ditch* litigation constituted a comprehensive general adjudication of water rights, expressly rejecting the Tribe's claim that the decree could bar re-litigation of only those claims actually litigated. The Ninth Circuit also correctly found that the cause of action in the present case is the same as the Government asserted in *Orr Ditch*. Further, the Ninth Circuit correctly held that the Tribe was precluded from asserting additional claims against the *Orr Ditch* defendants and their successors in interest. Nevertheless, regardless of the res judicata/collateral estoppel bar, the Ninth Circuit held that the United States and the Tribe could assert their new claims against TCID. The justification for this distinction was the lack of "adversity under the pleadings" between the Indians and TCID in the initial case.

This requirement of adversity under the pleadings runs contrary to this Court's recent decisions, as noted above, which reject outmoded technicalities in the application of res judicata/collateral estoppel. The Ninth Circuit's reasoning is also directly contrary to the reasoning of the Third, Fourth, Fifth, Seventh and Eighth Circuit Courts of Appeal in the cases cited above. The Ninth Circuit's decision thus stands alone in attempting to re-establish an outdated procedural requirement and should be reversed.

B. *The Ninth Circuit's Requirement of Strict Adversity on the Pleadings is Especially Inapplicable in the Context of General Water Rights Adjudications.*

While the Ninth Circuit conceded the unsuitability of the strict adversity requirement to the realities of general water adjudications, the court nevertheless strictly applied the requirement. Nevada Appendix p. 241a.

A general water rights adjudication provides a process whereby the relative water rights of all interested parties may be determined. It requires that all parties come forward and participate in a single action, submit all their claims, contest all disputed claims, and be bound by the result. A general water rights adjudication necessarily establishes mutual adversity among all interests involved. As this Court has noted with regard to appropriative water rights, "any order or action affecting one right affects all such rights." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). An exhaustive study completed for the National Water Commission concluded:

> "Due to the priority concept of the appropriation doctrine, if any such general adjudication of water rights is to be effective, it is imperative that all water users from a single source of supply be joined in one action and be bound by the results. Further, it is equally imperative that all of the users who are joined be required to submit all of their claims for adjudication."

National Water Commission, *A Summary—Digest of State Water Laws* 21 (1973). The Idaho Supreme Court has stated the matter succinctly, noting:

> "it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute." *Morgan* v. *Udy*, 79 P.2d 295, 299 (Idaho 1938).

In general adjudication proceedings, the United States frequently must make claims on behalf of numerous interests. This necessity arises from the fact the United States has vast land holdings in the West which, excluding the land it holds as trustee for Indian tribes, comprise approximately half of the surface area of the western states. *United States* v. *New Mexico*, 438 U.S. 696, 699 n.3 (1978). These land holdings vary from national forests to national defense installations. Each land use requires water.

Numerous actions heard in this Court demonstrate this process. In *United States* v. *District Court in and for Water Div. No. 5, Colorado*, 401 U.S. 527 (1971), this Court noted that the United States asserted claims on behalf of the Bureau of Mines, the Bureau of Sport Fisheries and Wildlife, the Bureau of Land Management, the National Parks Service and the Forest Service. In *Colorado River Water Conservancy District* v. *United States*, 424 U.S. 800 (1976), the United States asserted water rights for use on its own land and on behalf of its Indian wards. In *Arizona* v. *California*, 373 U.S. 546 (1963) the United States asserted water right claims on behalf of five Indian reservations, national forest, and national recreation and wildlife areas. This sample list graphically demonstrates the role of the United States in general adjudication proceedings in the West.

Viewed in this context, the strict requirement of "adversity under the pleadings" simply fails to reflect the reality of the comprehensive general adjudication of water rights involving the United States. Adversary alignment of plaintiffs and defendants is of little relevance in the litigation. The requisite adversity in the litigation is established by the nature of the process itself rather than by the posture of the parties in the pleadings. Whether or not all of the interests represented by the United States appeared adversely on the pleadings in the respective cases is irrelevant since the

claims were undeniably adverse to all other claims, regardless of the structure of the pleadings. To make the finality of the water rights in the above named cases depend upon outdated pleading technicalities would be a return to an era where form controlled over substance. This Court's recent decisions, as well as the decisions of other circuit courts of appeal, point in the opposite direction.

Adversity among the claims was clearly present in the *Orr Ditch* litigation. To establish a rule whereby adjudication decrees could be subject to attack because there was no adversity in the pleadings, as the Ninth Circuit has held, would truly create an alarming precedent which would call into question numerous other such decrees.

C. *There Was No Prohibited Conflict of Interest on the Part of the Attorneys for the United States Which Would Preclude the Application of Res Judicata.*

The Ninth Circuit correctly declined to find any federal conflict of interest which would prevent the application of res judicata.

When the United States brings a quiet title action, it must do so in all of its capacities because, as this Court has recognized, the resulting judgment will be solemnized by the principle of res judicata. *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904). In *Heckman* v. *United States*, 224 U.S. 413 (1912), this Court provided assurance to those who litigate against the United States in its capacity as trustee for an Indian tribe that the judgment reached will not be subject to attack at some later date:

> "There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents (Indian tribes) . . . . Its efficacy does not depend upon the Indians' acquies-

> cence. It does not rest upon convention, nor is it circumscribed by rules which concern private relations. It is a representation which traces its source to the plenary control of Congress . . .
>
> . . . (I)t must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation." 224 U.S. at 444-446.

The *Heckman* rule is especially applicable where, as here, any possible "conflict" inherent in the government's representation resulted from government policy decisions, not from any decision or action by the attorneys representing the interests of the United States. Nevada Appendix pp. 189a-190a.

If the Tribe is dissatisfied with the policy decisions made by the United States, then the Government, not the parties relying upon the "complete representation" rule of *Heckman*, should be made to answer. In this regard, this Court's decisions in *Kersch Lake Drainage District* v. *Johnson*, 309 U.S. 485 (1940) and *Kerrison* v. *Stewart*, 93 U.S. 155 (1876) are instructive. These cases hold that, absent fraud or collusion between the trustee and the adverse party, a beneficiary is bound by a judgment in an action in which he was represented by his trustee.

In the instant case thousands of individuals, both *Orr Ditch* defendants and subsequent appropriators, have relied in good faith on the *Orr Ditch* decree. These parties neither participated in nor were aware of any possible breach of duty on the part of the United States in representing the Tribe. Nevada Appendix p. 191a. It would be manifestly unfair to allow the Tribe to shift its alleged losses to innocent adverse parties based on the purportedly faithless actions of the United States. The Ninth Circuit's holding to this effect as against TCID establishes a rule whereby numerous private property rights may be threatened on the basis that the government may have represented its various property

interests in the same litigation. Established decrees could be put in jeopardy as a result of a government official concluding that he disagrees with claims, strategies or legal positions taken or made by his predecessors.

Clearly, the remedy available to the Tribe in the present case is to proceed against the government for its alleged breach of fiduciary duty. Congress has provided remedies and established a procedure for obtaining and recovering the value of rights lost as a result of a violation of duty. Indian Claims Commission Act, 25 U.S.C. § 70. Whether there was a breach of duty on the part of the United States is cognizable in the Indian Claims Commission proceeding. Indeed, in 1975 the Commission awarded the Pyramid Lake Paiute Indian Tribe $8,000,000 in a suit initiated by the Tribe for "damages suffered as the result of its not having received all of the water to which it was entitled under rights reserved for the Pyramid Lake Indian Reservation". *Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation* v. *United States, 36 Ind. Cl. Comm.* 256 (1975). Although the stipulated award was drafted in an attempt to preserve the within action, it clearly demonstrates the appropriate remedy for breach of fiduciary responsibility on the part of the United States. Nevada Appendix pp. 190a-191a. In such a context, it would be clearly unfair to allow the Indian Tribe to perfect rights against innocent parties who have relied upon the adequacy of the representation of the Indians by the government. Nothing in the facts of the instant case demonstrates any collusive or fraudulent conduct on the part of the attorneys who represented the Indians in the *Orr Ditch* litigation which should preclude the application of the principles of res judicata and collateral estoppel.

II. IN THE INTEREST OF SOUND PUBLIC POLICY, THE PYRAMID LAKE PAIUTE INDIAN TRIBE SHOULD BE BARRED FROM ASSERTING A RESERVED WATER RIGHT CLAIM FOR FISHERY PURPOSE IN PYRAMID LAKE.

A. *The Ninth Circuit's Decision Jeopardizes The General Adjudication Process so Essential to Management of Western Water Resources.*

As the Court has noted, it is probable that no problem of the southwest section of the nation is more critical than that of scarcity of water. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). This scarcity led the western states to develop elaborate systems of water right administration. Policy considerations dictated that these systems be based upon a rule of law under which water rights could be lost by non-use and acquired only by beneficial use. Public policy further dictated that the first person to beneficially use water be protected in his continued use as against subsequent users. The rule of law chosen to meet these needs was the doctrine of prior appropriation, by which a priority is accorded each water user based upon the date his appropriation was initiated. "Junior" appropriators can obtain rights only to water which is surplus to the needs of all prior appropriators.

The inherent interdependence of appropriative water rights, coupled with generally unsatisfactory experiences in attempting to determine relative appropriative rights in traditional quiet title suits, led the western states to adopt comprehensive general adjudication procedures. The essence of the general adjudication is to require all claimants to participate in a judicial proceeding, to submit all claims and, to the extent necessary, to contest the claims made by all other parties. While these procedures vary to some extent from state to state, they share the common purpose of achieving finality and assuring stability with regard to water rights in the West.

Congress chose to facilitate and encourage the general adjudication process by enacting the McCarran Amendment Act of July 10, 1952, and waiving the sovereign immunity of the United States relative to general water right adjudication. 66 Stat. 560, 43 U.S.C. § 666. This Court has continually reaffirmed the intent of the Amendment, holding in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 811 (1976) that:

> ". . . a construction of the Amendment excluding . . . (Indian water) rights from its coverage would enervate the amendment's objective."

The Security afforded by the general adjudication process has become a cornerstone of the efforts of the western states to properly manage their most precious water resources. Property rights throughout the West depend upon the stability of the process. If the United States or an Indian tribe is permitted to assert a claim to a reserved right after a final decree in a general adjudication has been entered, then the purpose of the general adjudication process will be frustrated. Allowing this in the instant case would not only upset the *Orr Ditch* decree but, as the cases cited above (in I.B.) demonstrate, bring into question the effect of numerous other adjudications involving Indian water rights claims.

B. *The Pyramid Lake Paiute Tribe Has Successfully Pursued Other Remedies for Damages to the Fishery at Pyramid Lake.*

In considering the interests of sound public policy as they relate to a potential re-litigation by the Pyramid Lake Paiute Indian Tribe of water rights decreed in the *Orr Ditch* litigation, the remedies already successfully pursued by the Tribe must be weighed.

The federal government has undertaken extensive efforts to protect Pyramid Lake and to renew the fishery. In 1956 Congress passed the Washoe Project Act, 43 U.S.C. 614, *et seq*, Section 4 of the Act provides:

> "Facilities shall be provided for the development of the fish and wildlife resources of the project area including facilities to permit increased minimum water release from Lake Tahoe and restoration of the Pyramid Lake Fishery." 43 U.S.C. § 614c.

Pursuant to this Act, the federal government has constructed or funded the construction of several trout hatcheries in the immediate area of Pyramid Lake and have constructed Marble Bluff Dam and Fishway at the mouth of the Truckee River. These facilities enable the Cui-Ui and trout to ascend directly to the Truckee River spawning grounds.

Between 1973 and 1976 Congress allocated some $32,000,000 in federal funds to restore the Pyramid Lake fishery. This does not include expenditures by the State of Nevada for this purpose. Nevada Appendix p. 190a. Moreover, since commencement of this action and during the appeal, Congress has appropriated and spent an additional $2,300,000 to construct a second fish hatchery at Pyramid Lake and has appropriated $2,100,000 for the operation of the reservation fish hatcheries for fiscal years 1981 and 1982. See, Sierra Pacific's Brief in Opposition to Cross-Petition p. 16.

After filing the instant suit, an action pending before the Indian Claims Commission resulted in a settlement awarding $8,000,000 to the Pramid Lake Paiute Tribe "for damages suffered as a result as its not having received all of the water to which it was entitled under the rights reserved for the Pyramid Lake Indian Reservation." *Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation* v. *United States*, 36 Ind. Cl. Comm. 256, 270 (1975). Nevada Appendix Pp. 190a-191a.

The trial court found that fishery restoration efforts have resulted in the successful introduction of a related trout species and that efforts in connection with the cui-ui justify optimism. Nevada Appendix P. 184a. Con-

sidering the efforts and expenditures already made to restore the Pyramid Lake Fishery, it cannot be reasonably argued that aspirations for the fishery require upsetting the *Orr Ditch* decree in disregard of settled principles of res judicata. The effect of the Ninth Circuit's decision is to provide for a taking of the decreed water rights of the Newlands Project property owners without compensation, an obvious injustice.

Instead, responsibility for any past damage to the Pyramid Lake Fishery has been and continues to be properly vested in the federal government. The legislative history of the Washoe Project Act clearly indicates federal recognition of responsibility for compensatory and restorative measures with regard to the fishery. Substantial efforts and sums of money have already been expended to discharge that responsibility. The principles of res judicata should not now be disregarded to shift that responsibility to other water users of the Truckee River.

CONCLUSION

The Court should reverse the decision of the Ninth Circuit insofar as TCID interests are denied the defense of res judicata. The holding that all other defendants are entitled to res judicata should be affirmed.

Respectfully submitted,

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